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DRAFT FOR COMMENTS (June, 2013)

Indigenous Belonging: A Commentary on Membership and Identity in the United Nations Declaration on the Rights of Indigenous People

Shin Imai and Kathryn Buttery¹

The following is a draft chapter from a forthcoming book, Oxford Commentaries on International Law: A Commentary on the United Nations Declaration on the Rights of Indigenous Peoples (Oxford University Press). Comments are welcome and can be sent to simai@yorku.ca.

The recognition of indigenous peoples' right to determine their own membership is crucial to the survival of indigenous groups and for their ability to meaningfully exercise their right to self-determination.² This chapter will begin with a discussion of who indigenous peoples are, and will then proceed to review the specific provisions of the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration) as they pertain to indigenous-determined group membership and duties: Articles 9 (right to belong); 33 (right to determine membership); 35 (right to determine responsibilities of members); and 36 (right to maintain relations across borders). Together, these provisions reinforce the right of indigenous peoples to define themselves, both in terms of membership and geographic scope. These rights are not absolute, however, and are constrained by Articles 44 (gender equality) and Article 46 (compliance with international human rights standards).

I. Who are indigenous people?

The Declaration does not provide a definition of “indigenous people,” nor a description of what characteristics make a person or group “indigenous.” This was not an accidental omission. The issue of whether and how to define “indigenous people” in the Declaration was contentious

¹ Shin Imai, Associate Professor, Osgoode Hall Law School. Kathryn Buttery, affiliate counsel, First Peoples Law Corporation. This is an initiative of the Justice and Corporate Accountability Project (justice-project.org). We would like to thank law students Ian McKellar and Stefan Rosenbaum for research assistance.

² Sharon Venne, *Our Elders Understand Our Rights: Evolving International Law Regarding Indigenous People* (Theytus Books, Penticton 1998) 116-199.

throughout the Declaration's development and continues to be controversial today. During the drafting of the Declaration, representatives of indigenous peoples stressed the importance of indigenous peoples maintaining the right to define themselves. However, some states argued that this would create a circular definition of indigeneity whereby people who claimed to be indigenous would define indigeneity based on the criterion that they themselves defined. Ultimately, states remained divided on the question of whether a definition was necessary, with some states expressing comfort with the lack of definition and other states objecting to the omission.³

In the end, the decision to proceed without a definition was informed by the fact that in other contexts, the United Nations had elected not to define other entities, such as "peoples" and "minorities," both of whom are the subject of extensive rights in United Nations documents.⁴ Professor James Anaya, the Special Rapporteur on the Rights of Indigenous Peoples at the time of writing, ascribed the ability to proceed with implementation without clear definitions to the United Nations' general approach:

... describing which groups in a practical sense are relevant to the programmatic focus, and vice-versa, rather than a matter of first prescribing abstractly which groups qualify as indigenous (and, implicitly, which ones do not) and then ascribing to them rights.⁵

While the Declaration is purposely silent on who is indigenous and on how indigeneity should be defined, one widely-accepted description used during the early discussions on the Declaration by José Martínez Cobo, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities provides that:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.⁶

³ For example, see Dalee Sambo Dorrough, 'Reflections on the UN Declaration on the Rights of Indigenous Peoples: An Arctic Perspective' in Steve Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, Oxford 2011).

⁴ Secretariat of the Permanent Forum on Indigenous Issues United Nations, 'The Concept of Indigenous Peoples' (Report) (January 2004) UN Doc. PFII/2004/WS.1/3 para 7.

⁵ S. James Anaya, *International human rights and indigenous peoples* (Aspen Publishers, New York 2009) 29.

⁶ José Martínez Cobo, 'Study on the Problem of Discrimination against Indigenous Populations' (7 July 1986) UN Doc. E/CN.4/Sub.2/José Martínez Cobo, 'Study on the Problem of Discrimination against Indigenous Populations' (Report) (7 July 1986) UN Doc. E/CN.4/Sub.2/1986/7 para 379–382.1986/7, para 379–382.

Variations on this formulation have appeared more recently in the International Labour Organization (ILO), Indigenous and Tribal Peoples Convention, 1989 (No. 169)⁷ and the Permanent Forum on Indigenous Issues.⁸

Based on these descriptions, a group or people who meet the definition of “indigenous” would:

1. have a connection to “pre-invasion or pre-colonial societies;”
2. self-identify as culturally and linguistically distinct from other groups in the population;
3. form a “non-dominant” sector of society; and
4. have a historical connection to a collective territory.

While the last three elements appear to have been accepted in practice, conceptions of the first element are changing to reflect a growing understanding that the idea of “pre-invasion” or “pre-colonial societies” is most relevant in relation to areas colonized by Europeans such as the Americas, Australia, and New Zealand. In these areas, European settlers invaded territories occupied by indigenous peoples and over time, through the use of violence and the sheer weight of numbers, placed indigenous peoples in marginalized positions relative to settler society. Indigenous peoples in these countries never lost their identity, but their cultures necessarily adapted to the settler presence, which in some cases resulted in the loss of their native language.⁹ As nations and peoples, the indigenous can identify connections to specific territories, although some of these communities may have been displaced and some individuals may have migrated to urban centres. Indigenous peoples in these countries usually form a small minority in relation to the dominant settler population, and as a result are often unable to fully participate in the political and economic mainstream.¹⁰

According to Martínez Cobo, the term “indigenous” should be restricted to situations where there was a European invasion, and should not be applied to the peoples of Africa and Asia.¹¹ However, as the concept of indigeneity is explored in new contexts, the concept of “pre-invasion” or “pre-colonial” is becoming increasingly difficult to apply. As will be discussed below, courts, human rights bodies and governments are now modifying the “pre-invasion”

⁷ ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, (adopted 27 June 1989), 1650 UNTS 28383 (ILO) art 1.

⁸ United Nations Permanent Forum on Indigenous Issues, ‘Who are Indigenous Peoples?’ (January 2004) PFII/2004/WS.1/3.

⁹ A notable exception are the Maori who are undergoing a revitalisation of their language. See Mason Durie, *Te mana te kaūwanatanga: The politics of Maōri self-determination* (Oxford University Press, Auckland 1998) 62–66.

¹⁰ In a few countries in Latin America, such as Bolivia, Ecuador and Guatemala, the indigenous population may be large, or even a majority. However, in all of those countries, they remain non-dominant and largely marginalized with respect to political and economic power.

¹¹ Amelia Cook and Jeremy Sarkin, ‘Who Is Indigenous?: Indigenous Rights Globally, in Africa, and Among the San in Botswana’ (2009) 18 Tul.J.Int’l & Comp.L. 94, 110.

requirement to take into account situations in African and Asian colonies by allowing for the creation of “indigenous” peoples *after* periods of colonization.

Indigenous peoples in Africa and Asia

In Africa and Asia, colonization imposed a European-dominated political and economic system on populations that were indigenous to the territory. However, the history of colonization in Africa and Asia differs from that of the Americas because the colonists never settled in sufficiently large numbers to overwhelm the local populations. In this sense, all of the non-European people in those colonies were “indigenous” and subsequently marginalized through the process of colonization. This dynamic made it difficult for some African nations to engage with the drafting of the Declaration or to see its relevance. Some considered the term “indigenous” itself to be derogatory.¹²

Although the process of colonization resulted in the marginalization of the majority of indigenous peoples in Africa, the extent to which indigenous peoples continue to remain marginalized post-colonization varies from state to state. After the departure of the colonial governments, newly independent African states were forced to confront the reality that within each country, some indigenous groups had become economically and politically dominant over others. In 2005, the Working Group on Indigenous Populations/Communities of the African Commission on Human and Peoples’ Rights produced a pioneering report which highlighted the relevance of the concept of indigeneity to Africa, including the issue of dominant groups within nation states post-colonization:

The indigenous movement in Africa has grown as a response to the policies adopted by independent post-colonial African states. As argued by Mohamed Salih, post-colonial African states have in many respects continued the suppression, dispossession and discrimination that was initiated by the colonial regimes: “Most post-independent African states were no less cruel towards their indigenous populations than the colonialists.”¹³

While an exhaustive list of peoples in Africa who identify as indigenous does not yet exist, the Indigenous Peoples of Africa Co-ordinating Committee describes the peoples in Africa that would be recognized by the Declaration as including “those who have been living by hunting

¹² Rachel Murray, ‘The UN Declaration on the Rights of Indigenous Peoples in Africa: The Approach of the Regional Organisations to Indigenous Peoples’ in Steve Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, Oxford 2011) 496.

¹³ ACHPR and International Work Group for Indigenous Affairs, ‘Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities: submitted in accordance with the ‘Resolution on the Rights of Indigenous Populations/Communities in Africa’ (African Commission on Human and Peoples’ Rights ; International Work Group for Indigenous Affairs ; Distribution in North America Transaction Publishers 2005) 92.

and gathering or by transhumant (migratory nomadic) pastoralism.”¹⁴ The concept of indigeneity in the African context was further articulated by the African Commission on Human and Peoples’ Rights in 2009 in a decision dealing with a dispute between the government of Kenya and a group claiming indigenous rights. The case was brought by the Centre for Minority Rights Development, a Kenyan NGO, on behalf of the Endorois, who are pastoralists that had, for hundreds of years, raised cattle on the fertile land around Lake Bogoria. The government of Kenya evicted the Endorois in order to create game preserves. Ultimately the Commission found that the Endorois were indigenous within the meaning of the Declaration, and went on to describe four key characteristics of indigeneity:

These are: the occupation and use of a specific territory; the voluntary perpetuation of cultural distinctiveness; self-identification as a distinct collectivity, as well as recognition by other groups; an experience of subjugation, marginalisation, dispossession, exclusion or discrimination.¹⁵

It is noteworthy that this formulation does not include the “pre-colonial” or “pre-invasion” requirement as part of indigeneity in Africa.

In Asia, defining the concept of indigeneity is similarly challenging because while citizens of Asian states are “indigenous” vis-à-vis European colonialists, there are clearly certain groups within these countries that are politically and economically marginalized relative to others. Identifying certain groups as indigenous is also complicated by the difficulty of establishing chronological priority. Addressing this problem in the context of Nepal, James Anaya explains:

The country’s population overall is the product of a long and complex history of original settlement and migration both into and within the territory of present-day Nepal, and of social and political processes that are strongly rooted in that territory and date back centuries.¹⁶

Notwithstanding this complexity, the government of Nepal does recognize a number of groups as indigenous (*Adivasi Janajati*). India, on the other hand, does not recognize the existence of indigenous peoples within its borders¹⁷ even though its Constitution provides for over 600 Scheduled Tribes who generally identify as indigenous and would meet the established criteria of indigeneity discussed above.¹⁸

¹⁴ —‘Indigenous Peoples of Africa Co-ordinating Committee’ (Indigenous Peoples of Africa Co-ordinating Committee) <<http://www.ipacc.org.za/eng/default.asp>> accessed 27 April 2013.

¹⁵ African Commission on Human and Peoples’ Rights, ‘Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya’ (4 February 2010).

¹⁶ UN Human Rights Council, ‘Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: addendum : report on the situation of indigenous peoples in Nepal’, (20 July 2009, A/HRC/12/34/Add.3) para 11.

¹⁷ Pooja Parmar, ‘Undoing Historical Wrongs: Law and Indigeneity in India’ (2012) 49 Osgoode Hall L.J. 491, 496.

¹⁸ Parmar (n 17) 497.

In Africa and Asia, then, the trend is to recognize indigeneity in relation to a lack of political and economic power, an identifiable territorial connection, and self-identified cultural or linguistic distinctiveness rather than in relation to colonialism.

Indigenous peoples because of, but not before, colonial invasion

In the Americas, where there was a much clearer “invasion” by the Europeans, defining the concept of indigeneity has become complex and cannot be accurately captured by a simplistic binary distinction of European/indigenous.

In Canada, for example, the Métis people came into being as the result of the union of French or English fur traders with indigenous women, creating a distinct group that was neither European nor Indian. In one area of Canada, the Métis developed their own language and participated in two revolts in 1870 and 1885 in order to secure their own homeland within Canada.¹⁹ The Canadian government has since acknowledged that the Métis have a distinct interest in the land and has explicitly recognized them as one of Canada’s Aboriginal people in the Constitution in 1982.²⁰

In Latin America, there are groups of peasants, often referred to as *campesinos*, who hold land communally. In Peru, the *campesino* communities were born out of a land distribution that followed the breaking up of the large *haciendas*. These communities have their own legal mechanisms and see themselves as distinct from both the mainstream Peruvian population and from the indigenous population. The current constitution distinguishes between *comunidades campesinas* and *comunidades nativas*,²¹ although in the 1930s they were both referred to as “indígenas.”²² For the purposes of international law, however, Peru recognizes both *comunidades campesinas* and *comunidades nativas* as indigenous, and as such both qualify as groups that must be consulted in relation to resource development in their territories.²³

In areas of Latin America, there exist communities of escaped slaves, sometimes referred to as Maroons or *afrodescendientes*, who have lived in their own communities within the jungles and in the countryside for hundreds of years. Of course, these groups did not precede the arrival of the Europeans, but their situation is very similar to that of indigenous peoples in Africa in that they are marginalized and identify as indigenous vis a vis the dominant groups in their country. For example, in Bolivia, the situation of the *afrodescendientes* is explicitly recognized in the Constitution, which provides that the *afrodescendientes* enjoy the same rights as indigenous

¹⁹ Aboriginal Affairs and Northern Development Canada, *Report of the Royal Commission on Aboriginal Peoples*, vol. 4 (Canada Communication Group, Ottawa 1996) chap. 5.

²⁰ Constitution Act 1982 (UK) s (35)(2) “The aboriginal peoples of Canada include Indians, Metis and Inuit.”

²¹ Constitución Política de Perú 1993 s (89).

²² Charis Kamphuis, ‘Foreign Mining, Law and the Privatization of Property: A case study from Peru’ (2012) 3 JHRE 217.

²³ Ley del Derecho a la Consulta Previa a los Pueblos Indígenas u Originarios reconocido en el Convenio 169 de la Organización Internacional del Trabajo 2011 (Peru) s (7).

people.²⁴ In Suriname, the Inter-American Court of Human Rights recognized the indigeneity of *afrodescendientes* in their 2007 ruling on a complaint against the Suriname government regarding resource extraction within the territory of the Saramaka, an *afrodescendiente* group. Drawing heavily from the Declaration,²⁵ the Court found that the Saramaka were a “tribal people” within the meaning of the ILO 169.²⁶ As a remedy, the Court ordered the Suriname government to demarcate Saramaka territory and to stop resource extraction until the free, prior, informed consent of the Saramaka was obtained.²⁷

II. Article 9: The Right to Belong

In the section above, we ended with three external criteria that are relevant for national or international recognition as an indigenous *community*. Here, we discuss what it means for an *individual* to self-identify as indigenous.

Article 9 requires that in order for an individual to be entitled to the rights set out in the Declaration, they must show acceptance by the indigenous community with which they self-identify. Article 9 also prohibits discrimination on the basis of membership to an indigenous group. We see the origins of this Article in the “working definition” formulated by Martínez Cobo in 1986, which states that:

On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group).

This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference.²⁸

Under this definition, the rights set out in the Declaration will apply only to an individual who both self-identifies as indigenous and who is accepted as a member of that indigenous group.

²⁴ Constitución Política del Estado Plurinacional de Bolivia 2009 (Bolivia) s (32):

“El pueblo afroboliviano goza, en todo lo que corresponda, de los derechos económicos, sociales, políticos y culturales reconocidos en la Constitución para las naciones y pueblos indígena originario campesinos”.

²⁵ Luis Rodríguez Pinero, ‘The Inter-American System and the UNDRIP: Mutual Reinforcement’ in Steve Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, Oxford 2011).

²⁶ ILO (n 7) 1.

²⁷ *Saramaka People v. Suriname*, Inter-American Court of Human Rights Series C No 172 (28 November 2007).

²⁸ *Cobo* (n 6).

Individual self-identification and group acceptance

The requirement for acceptance by an indigenous group protects the integrity of the indigenous people in question by preventing claims to indigeneity by individuals who do not meet the criteria for group membership, as defined by the indigenous group. However, we have identified three situations in which individuals may self-identify as indigenous and have genealogical ties to an indigenous people, but, for a variety of reasons, may not belong to any specific indigenous community. The first group consists of those who have lost their connection to their community through the process of colonization. For example, many Māori in Aotearoa/New Zealand are not registered with an *iwi* (tribe) as a result of migration to urban centres and government policies hostile to tribal organizations.²⁹ The second group consists of those who have been excluded by state legislation. In Canada, the federal government's *Indian Act* determines membership in Indian bands and for nearly one hundred years provided that Indian women who married non-Indian men lost their status as Indians. For Indian women who married non-Indian men, this led to the severing of legal ties to the Indian community and loss of rights to reside on reserve, both for the women and their children. The descendants of these women and children were often referred to as "non-status" Indians.³⁰ The third group consists of those who were once members of an indigenous group but were subsequently excluded by the rules of the indigenous community. This group includes former members of American Indian tribes who have been "disenrolled," as discussed below under Article 33.

Do these individuals have rights under the Declaration? The Declaration is primarily aimed at the exercise of collective rights of indigenous peoples. However, there are several provisions in the Declaration that specifically refer to "indigenous individuals," such as Article 24.2, which provides that "[i]ndigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health." In our view, rights that are directed toward "indigenous individuals" apply to both those who have been accepted into a community as well as those who have a genealogical connection to an indigenous people, but who are not members of any specific community.

We do not comment on the extent of genealogical connection that might be necessary to establish a connection to an indigenous group. However, courts in Canada involving the Métis provide some guidance on how this Article might be interpreted. In 2003, the Supreme Court of Canada held that individuals who identified as Métis and were accepted by a contemporary existing Métis community could exercise Aboriginal hunting rights.³¹ After that decision, individuals in various regions of Canada self-identified as Métis and claimed to be exempt from

²⁹ Jacinta Ruru, 'The Maori Encounter with Aotearoa:New Zealand's Legal System' in Benjamin Richardson, Shin Imai and Kent McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, Oxford 2009) 130.

³⁰ John Olthuis, Nancy Kleer, Roger Townshend, *Aboriginal Law Handbook* (3rd edn Thomson Carswell, Toronto 2008) ch 11.

³¹ *R. v Powley* (2003) SCJ 43 (Supreme Court of Canada).

provincial hunting regulations. Courts rejected cases where the claimants were unable to demonstrate their connection to a historical Métis community. For example, in one case, the judge found that the individual claiming to be Métis was ten to twelve generations removed from a Chief who had signed a Treaty in 1693. The individual discovered his Aboriginal lineage when he was 32 years old. The Court then continued:

He has joined several off-reserve Métis and Aboriginal organizations, including the self-styled Canadian Métis-Indian Coalition, Wiskipkpaqtism Off-Reserve Mi'kmaq Bands, Canadian Off-Reserve Indian Nations, Inc. and the Nation of Acadian Métis Indians. While he has shown acceptance in those organizations, he demonstrates no connection to any contemporary rights-bearing community, or for that matter, to any Indian band or other aboriginal community, rights-bearing or not. ... Membership in self-styled organizations does not make one aboriginal for purposes of constitutional exemptions.³²

No discrimination permitted for exercising the right to belong to an indigenous community

During the drafting of the Declaration, some participants proposed that the term “discrimination” should be clarified by substituting the word with terms such as “disadvantage” or “adverse discrimination.” While those suggestions were not ultimately incorporated into the Article, it is clear that the objective of this provision is to prevent adverse treatment of indigenous peoples, while continuing to protect those rights of indigenous people that differ from the rights of other citizens.³³

Issues of discrimination against indigenous peoples and individuals are discussed fully elsewhere in this book. In the context of Article 9, we note that a state’s obligations would be satisfied by way of an explicit statement in legislation that discrimination will not result from membership in an indigenous people or community. An example can be found in the Constitution of Ecuador, which states that one of the collective rights of indigenous people is “[t]o not be the target of racism or any form of discrimination based on their origin or ethnic or cultural identity.”³⁴

III. Article 33: Control of Membership

There are three distinct matters covered in this Article: the right to determine membership; the right to citizenship in the state; and the right to decide the structure and membership in the indigenous peoples’ institutions.

³²*R. v Hopper* (2008) NBCA 42 (New Brunswick Court of Appeal) [18].

³³ United Nations, ‘Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32’ (September 2004) (E/CN.4/2004/WG.15/CRP.2 6).

³⁴ Constitución del Ecuador 2008 s (57)(2).

The right to decide on membership

For indigenous peoples, control of membership is a key component of self-determination. It is through this process that a nation can determine its body politic, which individuals are entitled to share in the benefits and responsibilities of the nation, and how new members are incorporated into the nation.

The existence of paragraph 1 of this Article originates in part from lessons learned from unfortunate experiences in some of the present-day settler states where membership is still determined by the state and rather than by the indigenous peoples themselves. The problems which can result from state-defined indigenous membership are exemplified by Canada's *Indian Act*, which identifies which groups are "Indian bands" and which individuals are allowed to be members of these groups. Because the British settlers had a patrilineal kinship system, at the time the *Indian Act* was enacted in 1876, Indian membership was determined along the male line, notwithstanding the fact that many indigenous nations in Canada are matrilineal. An Indian man who married a non-Indian woman would confer membership on the non-Indian woman, and all of the children of this relationship would also be members. However, as explained above, if an Indian woman married a non-Indian man, she and all her children were removed from the membership list. This situation was somewhat remedied in legislative amendments made in 1985 and 2010, but remains a very contentious point.³⁵

A similar problem of state enforced exclusion occurred in the United States, where the government, in the 1971 *Alaska Native Claims Settlement Act*, imposed the requirement that beneficiaries be of at least "one quarter Native blood."³⁶

On the other hand, in Australia the statute-imposed definition of "Aboriginal" has caused some controversy among aboriginal communities who criticize the definition for being over-inclusive and including individuals who discovered their aboriginal heritage later in life.³⁷

Article 33 would seem to remedy the problem of states defining who is a member of an indigenous group by making clear that indigenous peoples have the authority to decide their membership. However, there could theoretically be a dispute about the meaning of the group's right to define membership "in accordance with their customs and traditions." Interpreted narrowly, these words might suggest a backward-looking perspective which requires proof of the existence of the custom or tradition of the indigenous group from some time in the distant past - and perhaps even proof of unbroken continuity - to the present. Australian courts have taken this narrow approach to interpreting customs in relation to land occupation.³⁸ However, in the context

³⁵ Mary Eberts, 'McIvor: Justice Delayed-Again' (2010) 9 Indigenous Law Journal 15.

³⁶ *Arctic Perspective* (n 3) 518.

³⁷ Jennifer Clarke, 'Australia: The White House with Lovely Dot Paintings whose Inhabitants have "Moved on" from History?' in Benjamin Richardson, Shin Imai and Kent McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, Oxford 2009) 86.

³⁸ *Members of the Yorta Yorta Community v Victoria* (2002) HCA 58 (High Court of Australia).

of the membership provisions in the Declaration, these words should be interpreted to refer to membership rules that are operative in the community from time to time. While the rules are often based on genealogical connection, there is no reason that communities should not have rules for granting membership to those with no genealogical connection.³⁹ In Canada and the United States, scholars have argued that indigenous communities should depart from strict genealogical rules and move toward a more political approach to membership that would take into account family and cultural identification.⁴⁰ These are discussions properly conducted by indigenous peoples themselves. State institutions, such as courts or government ministries, should not intervene to define what constitutes a group's "customs and traditions" for membership purposes.

Having said this, in practice there will be complicating factors for states, especially in relation to the allocation of resources. For example, in Canada much of the government funding to First Nations is based on a per capita formula, and as a result, the government has a vested interest in limiting the number of individuals who qualify for membership under the *Indian Act*. Although First Nations in Canada are free to decide on criteria for membership in individual communities, the federal government will only recognize and fund those individuals that fit the federal definition.⁴¹ We do not think that the Article 33 was intended to provide only for the right of indigenous peoples to identify members for their own internal purposes, while placing no corresponding obligation on the state to recognize who is "indigenous" for the purposes of state legislation. Rather, the Declaration contemplates indigenous peoples living within larger states, and as such, provisions such as Article 33 only make sense if they can compel the state to accommodate the indigenous peoples.

This is not to deny that states can be faced with legitimate challenges with implementation in certain situations. However, circumstances where it is necessary to determine which individuals are members of an indigenous group can be accommodated by a system of sharing indigenous registration information with the state. Furthermore, where there is a genuine concern that opportunistic indigenous groups will appear solely to claim benefits associated with indigenous status, states may need to impose objective criteria on indigenous membership. This was exemplified by the Canadian court decision on Métis membership discussed above in relation to Article 9.

³⁹ Kirsty Gover, *Tribal constitutionalism: states, tribes, and the governance of membership* (Oxford University Press, Auckland 2010).

⁴⁰ For Canada, see Pamela D. Palmater, *Beyond blood: rethinking indigenous identity* (Purich Publishing, Saskatoon 2011). For the United States see Matthew Fletcher, 'Tribal Membership and Indian Nationhood' (presented at the Sovereignty and Identity Symposium American Indian Law Review 1 March 2012) <<http://ssrn.com/abstract=212981>> accessed 15 April 2013.

⁴¹ *Aboriginal Law Handbook* (n 32) 232–233.

Recognition of new groupings of indigenous peoples

The identification of specific indigenous communities, together with their members and territory, is becoming increasingly important both for agreements which address past wrongs perpetrated by state governments against indigenous groups, and for new agreements relating to the use of traditional territories for resource extraction.

We have referred to the challenges faced by urban Māori who have lost touch with their traditional *iwi* structures. The New Zealand Law Commission addressed this issue in its report, *Waka Umanga: A Proposed Law for Māori Governance*. The Commission recommended creating a special corporate vehicle called the *waka umanga* to provide a legal structure to their communities. The *waka umanga* would have some of the characteristics of a corporation but most of the internal governance arrangements would be developed by the Maori collectivity. The Law Commission regarded the *hapu* (sub-tribe) as the basic community unit, and suggested that there should be at least fifty members for the group to be viable:

... A viable *hapu* being one that can respectably manage customary requirements in welcoming, feeding and bedding other tribal groups. That probably requires an active and local membership of at least 50, as nowadays all are not available for every event.⁴²

The Law Commission recommended that fifteen people could propose or oppose the creation of a *waka umanga* and that disputes could be taken to the Māori Land Court, which has expertise on Māori issues. Initially, it would be those individuals that get together to make or oppose the *waka umanga* that would determine the membership of the group. Outside of the requirement for the minimum size of a *hapu*, would be no imposed criteria. The Law Commission stated that “it is the right of a tribe to determine its own membership and membership rules.”⁴³

In Canada, the Royal Commission on Aboriginal Peoples also turned its mind to a process for creating indigenous nations with their own land bases and self-governing jurisdiction. According to the Commission, Canada’s six hundred or so “Indian bands” created under the *Indian Act* would need to be reconstituted as larger nations based on 50-80 traditional affiliations.⁴⁴ These larger nations would hold the inherent right to self-government. The Commission suggested that a charter group, such as a group of bands currently recognized under the *Indian Act*, could hold a referendum to determine whether to proceed toward self-government. This group would then develop a constitution and membership criteria that would be inclusive of those historically excluded by the membership criteria of the *Indian Act*. Membership would not depend on blood quantum. Rather, the Commission contemplated that there would be wide consultation with all

⁴² New Zealand Law Commission, ‘Waka Umanga: A proposed law for Maori Governance Entities’ (Law Com No 92, 2006) [7.65].

⁴³ *New Zealand Law Commission* (n 45) [4.50]. This proposal was presented to Parliament, but it was never enacted.

⁴⁴ Aboriginal Affairs and Northern Development Canada, ‘Report of the Royal Commission on Aboriginal Peoples’ (Report) (1996) 181.

potential members, and that prior to being recognized by the government, the constitution and membership criteria would be presented to a Recognition Panel composed of a majority of Aboriginal people.⁴⁵

Neither the New Zealand Law Commission's *waka umanga*, nor the Canadian Royal Commission's recommendations were adopted, but they provide potential models to be adopted in the future.

Limitations on control of membership

While in Canada indigenous membership is determined by state legislation, in the United States, federally-recognized tribes have their own inherent jurisdiction to determine membership through their individual constitutions. This jurisdiction has been upheld by the US Supreme Court in the case of *Santa Clara Pueblo v Martinez*,⁴⁶ in which the court considered a Pueblo tribal law which provided that the children of a woman who married out of the tribe lost their tribal membership. In that case, a Pueblo woman married a Navajo man and the family continued to live on the reserve. The mother and a child challenged the law as discriminatory because the children of men who married out of the tribe retained Pueblo membership. The US Supreme Court held that federal courts lacked jurisdiction to deal with claims because enforcement of the statute was a tribal matter. The response to this decision was varied, with some hailing it as an affirmation of tribal sovereignty⁴⁷ and others viewing it as an example of toleration of sexism within tribal communities.⁴⁸

In recent years, other examples of apparent discrimination have arisen in the U.S. tribal system, particularly in relation to decisions by some tribes to 'disenroll' certain members. Perhaps the best known case is that of the Cherokee Freedmen, who were descendants of African Americans who had lived with the Cherokee for generations. In 2007, the Cherokee Nation amended its constitution to remove 2,800 Freedmen from membership in the Cherokee tribe, effectively stripping them of all political and economic rights associated with being a member of the tribe. The decision was upheld by the Cherokee Nation Supreme Court in 2011.⁴⁹ In another case, tribe members who were descended from families who had married Filipinos were similarly disenrolled by the Nooksack tribe.⁵⁰ Racial issues may play a part in some of these decisions, but

⁴⁵ *Commission on Aboriginal Peoples* (n 47) 314-320.

⁴⁶ *Santa Clara Pueblo v Martinez* (1978) 98 S Ct 1670 (United States Supreme Court).

⁴⁷ John R. Wunder, *Retained by the people': a history of American Indians and the Bill of Rights* (Oxford University Press, Oxford 1994).

⁴⁸ David H. Getches, *Cases and materials on federal Indian law* (5th edn Thomson/West 2005), American casebook series 399-405.

⁴⁹ Darryl Omar Freeman, 'Neo-Colonial Adaptation or Neo-Sovereignty: Oklahoma Cherokee/African Ancestry Freedmen Conflict' (2011) <<http://ssrn.com/abstract=1941471>>.

⁵⁰ Gail Courey Toensing, 'Nooksack Indian Tribe in Disenrollment Fight' *Indian Country Today* (New York 11 April 2013)

<<file:///C:/Users/admin/Desktop/current/2/readings/Nooksack%20Indian%20Tribe%20in%20Disenrollment%20Fig%20-%20ICTMN.com.htm>> accessed 20 April 2013.

commentators often point to the distribution of casino profits as a reason for decreasing enrolled members. By reducing the number of members, the remaining members will receive greater share of the casino profits.⁵¹

Native American commentators have further noted that there is a lack of recourse for indigenous individuals in cases of apparent discrimination on the part of indigenous groups. As academic and tribal court judge Wenona Singel observes:

This gap in the human rights system exists because tribes do not have direct obligations under public international law, they are largely immune from external accountability under the domestic law of the United States, and they are frequently immune from judicial review within their own systems of tribal law.⁵²

On the one hand, an argument can be made that tribes are acting within their rights under Article 33 in deciding membership “in accordance with their customs and traditions.” However, it can also be argued that these rights are limited by provisions in the Declaration that limit the authority of indigenous institutions. Article 44, for example, states that the rights in the Declaration will be “equally guaranteed to male and female indigenous individuals,” and Article 46 states that the exercise of the rights in the Declaration must adhere to international standards and are to be interpreted “in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.” The application of these standards to the membership provisions of the Declaration was contemplated during the drafting stage. Some states proposed to add the words “where those traditions and customs are consistent with international human rights standards” to the Articles dealing with membership, but decided to withdraw the amendment, believing that Article 46 would apply.⁵³

We argue that the right to determine membership is not absolute. In the case of the Cherokee Freedmen or the Santa Clara Pueblo, the tribes’ rights should be subject to gender equality or non-discriminatory provisions which are outlined in the Declaration itself. These limitations conform to existing international practice with respect to state recognition of indigenous membership. In Canada, for example, the aboriginal and treaty rights protected under the Canadian Constitution are guaranteed equally to male and female persons.⁵⁴ Similarly, in Ecuador, the Constitution provides that the exercise of rights by indigenous peoples cannot breach the rights of “women, children and adolescents.”⁵⁵

The challenge is to decide how international standards should be implemented in light of the right to define membership as set out in the Declaration. The United Nations standards apply

⁵¹ Wenona Singel ‘Indian Tribes and Human Rights Accountability’ (2012) 49 San Diego L.Rev. 567, 610-11.

⁵² *Human Rights Accountability* (n54) 568.

⁵³ UNCHR, ‘Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32’ (6 March 2002) UN Doc E/CN.4/2002/98) [67].

⁵⁴ *Constitution Act* (n 20) s (35)(4).

⁵⁵ *Constitución del Ecuador* (n 36) s (57)(10).

only to states, not tribes, and accordingly American tribal courts, to the extent that they are exercising inherent jurisdiction, do not come under the purview of these standards. This has led lawyer Greg Rubio to suggest that the federal government should be responsible for ensuring that international standards relating to discrimination apply to tribal governments.⁵⁶ In the case of the Cherokee Freedman, tremendous federal government pressure, including threats to withhold funding, ultimately led to the Cherokees' reversal of their decision to disenroll the Freedmen. While the actions of the United States government clearly interfered with the sovereignty of the tribe, under Rubio's approach, the American government could be seen as fulfilling its obligations under international law.

The idea that only states have the power to ensure that indigenous people comply with standards set out in the Declaration seems unintuitive, given that the thrust of the Declaration is to recognize greater autonomy for indigenous peoples. It also seems odd that the indigenous peoples that are recognized under the Declaration would be powerless to ensure compliance with the Declaration itself. These considerations lead us to consider the possibility of an alternative approach.

Can we argue that the Declaration contemplates the creation of indigenous entities that are not fully nation states, but are sufficiently autonomous to be able to implement United Nations standards? We suggest that by granting the right to determine community membership, as well as requiring that indigenous peoples' institutions comply with international human rights standards, the Declaration implicitly necessitates the creation of indigenous political entities with governance structures capable of ensuring that the customs, policies and laws of the indigenous people conform to such standards. In this model, tribal courts or their equivalents in other parts of the world would have the jurisdiction to impose international standards directly without requiring recourse to the nation state. While a more complete exploration of this issue is not possible within the framework of this chapter, it is a question that will have increasing relevance as membership issues become prominent.⁵⁷

Citizenship in the states in which indigenous peoples live

During the development of the Declaration, no concerns were expressed with respect to the right of indigenous individuals to be citizens of the states in which they lived. Ecuador implements this Article clearly in its Constitution:

⁵⁶ Greg Rubio 'Reclaiming Indian Civil Rights: The Application Of International Human Rights Law To Tribal Disenrollment Actions' (2009) 11 Oregon Review of International Law 1.

⁵⁷ *Indian Tribes and Human Rights Accountability* (n 54). Singel proposes the creation of an intertribal human rights system to provide external accountability for tribal decisions.

Ecuadorian nationality is a political and legal bond between individuals and the State, without detriment to their belonging to any of the other indigenous nations that coexist in plurinational Ecuador.⁵⁸

Similarly, the Constitution of Bolivia permits individuals to register their cultural identity on documents issued by the state, such as passports and citizenship documents.⁵⁹

Right to determine structures and membership of institutions

It is unclear from the wording of this Article whether it simply allows indigenous peoples the right to determine the structure and membership of their institutions related to membership, or whether it is more expansive and is meant to be a statement of a general right to determine structures of all institutions within the community. This provision was an independent article in early drafts of the Declaration but was subsequently incorporated into Article 33. This Article is very similar to Article 34, which recognizes indigenous peoples' right to "promote, develop and maintain their institutional structures." However, there are two differences between the Articles. First, unlike Article 34, paragraph 2 of Article 33 specifically includes the right to select the membership of the institutions. Second, Article 34 states that the institutions must conform with "international human rights standards," whereas paragraph 2 of Article 33 is silent on this point.

In our view, it is not necessary to make fine distinctions between these two Articles. The process of drafting the Declaration may have resulted in some confusion in the wording of the text, but the overall intent of these Articles, taken together, is clear: indigenous peoples have the right to establish their own institutional structures, which necessarily includes the right to decide the composition of its members, but are simultaneously subject to the provisions within Article 44 (gender equality) and Article 46 (human rights).

IV. Article 35: Right to Determine Responsibility of Members

This Article provides that "[i]ndigenous peoples have the right to determine the responsibilities of individuals to their communities." The wording is curious. In a liberal democratic state, one would usually cast the relationship between individuals and communities as one where citizens have the presumed right to live autonomously, subject to limitations established by the state in order to ensure the welfare of the citizenry as a whole. This type of relationship between state and citizen is captured in Article 4, which provides for the "right to autonomy or self-government". Article 4 contemplates that the "governments" of indigenous peoples will establish rules that will be enforced. The implicit assumption is that if there is no rule prohibiting or prescribing a specific action, there is no requirement to conform to any particular form of behaviour.

⁵⁸ *Constitución del Ecuador* (n 36) s (6).

⁵⁹ *Constitución Política del Estado Plurinacional de Bolivia* (n24) s (30)(II)(3).

By contrast, Article 35 hints at a different type of relationship between an indigenous people and its members. It is not a relationship based on laws imposed on individuals through the organs of the state, but rather a relationship based on individual members assuming responsibilities to the collective. The responsibilities are articulated as a set of expected behaviours rather than a list of prescriptive rules enforced through rigid hierarchies found in the legislatures, police and judiciaries. In an indigenous society, power may be more diffuse and norms may be articulated through mechanisms such as feasts, ceremonies and informal dispute resolution.⁶⁰

If our view of Article 35 is correct, we can imagine circumstances where there may be responsibilities that are vital to the preservation of culture which cannot be appropriately or adequately captured by state legislation. For example, First Nations on the Pacific Coast in Canada have a custom called the potlatch which involves individuals giving away accumulated property to other members of the community. At one point in Canadian history, these potlatches were outlawed as part of a general ban on all First Nation practices. In practice, First Nations continued to practice banned traditions underground, fulfilling their cultural responsibilities in the face of the legal prohibition.⁶¹ If such a state law were in effect today, yet the community determined that individuals who had accumulated wealth had the responsibility to hold a potlatch, which rule would be paramount? We would argue that today, Article 35 should operate to protect the responsibilities assigned by the community over the prescriptions of state law.

V. Article 36: Right to Maintain Relations Across Borders

The territories of indigenous peoples long predate the borders of the modern nation-state, and in most cases, national borders do not conform with the pre-existing territories of indigenous peoples. As a result, indigenous peoples' ability to maintain their culture and traditional practices may be significantly compromised where their territories are intersected by international borders.

Article 36 recognizes, on an international level, the right of indigenous peoples to maintain and develop contacts, relations and activities for spiritual, cultural, economic and political activities across borders, and places a positive obligation on states to "take effective measures to facilitate the exercise and ensure the implementation of this right." Globally, the extent to which states acknowledge and facilitate the cross-border rights of indigenous peoples ranges from Ecuador's explicit constitutional guarantee of the right of indigenous peoples to develop contacts with peoples divided by international borders, to the United States' construction of a militarized fence

⁶⁰ Val Napoleon, 'Living Together: Gitksan Legal Reasoning as a Foundation for Consent' in Jeremy Webber and Colin M. Macleod (eds) *Between Consenting Peoples: Political Community and the Meaning of Consent* (UBC Press, 2010) 45–76 and John Borrows, *Canada's Indigenous Constitution* (University of Toronto Press, Toronto 2010) 23–106.

⁶¹ J. Lutz, *Makúk* (UBC Press, Vancouver 2008) and C.F. Roth, *Becoming Tsimshian: The Social Life of Names* (University of Washington Press, Seattle 2008).

on the U.S.-Mexico border, which effectively prohibits indigenous peoples from exercising their rights pursuant to Article 36 of the Declaration.⁶²

Prior to the Declaration, the rights of indigenous peoples to maintain and develop ties across international borders was recognized in 1989 in ILO 169, Article 32:

Governments shall take appropriate measures, including by means of international agreements, to facilitate contacts and co-operation between indigenous and tribal peoples across borders, including activities in the economic, social, cultural, spiritual and environmental fields.⁶³

A similar provision was included in Article 2.5 of the 1993 versions of the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (the Minorities Declaration), which states that:

Persons belonging to minorities have the right to establish and maintain, without any discrimination, free and peaceful contacts with other members of their group and with persons belonging to other minorities, as well as contacts across frontiers with citizens of other states to whom they are related by national or ethnic, religious or linguistic ties.⁶⁴

The draft text of Article 36 was the subject of discussion and revisions during the UN Commission for Human Rights' Working Group on Indigenous Populations, where indigenous observers and participating states expressed divergent views about the appropriate scope of indigenous peoples' cross-border rights. One indigenous observer noted that "where a boundary imposed by nation States divides or cuts through aboriginal lands, guarantees should be provided so as not to make immigrants out of indigenous peoples who have occupied that territory since time immemorial."⁶⁵ However, participating states expressed concerns that the article would compromise the right of states to maintain the security of borders, and about whether it was reasonable to require states to "ensure" the implementation of cross-border rights for indigenous peoples.⁶⁶

Notwithstanding these concerns, the final version of Article 36 requires that states take effective measures to facilitate the exercise and ensure the implementation of cross-border rights. However, as the following examples will suggest, the extent to which states uphold the spirit and intent of Article 36 has been inconsistent at best.

⁶² *Constitución del Ecuador* (n 36) s (57)(18).

⁶³ *ILO 169* (n 7).

⁶⁴ UNGA, 'United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities' (3 February 1993) UN Doc RES/47/135.

⁶⁵ UNCHR 'Reporting of the Working Group on Indigenous populations on its Fifth Session' (24 August 1987) UN Doc E/CN.4/Sub.2/1987/22.

⁶⁶ UNCHR 'Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32' (10 December 1996) UN Doc. E/CN.4/1997/102.

Examples of current practices and the extent to which they are consistent with Article 36

(a) United States – Canada border

The U.S. and Canada recognize, to a limited extent, the rights of indigenous peoples to maintain and develop their culture across the U.S.-Canada border. However, although the U.S. and Canada differ in their approach to cross-border indigenous issues, neither country has demonstrated complete adherence to the principles set out in Article 36.

Perhaps the most significant acknowledgement of the rights of indigenous peoples whose territory crosses the U.S.-Canada border is the United States' recognition of a right for indigenous people who possess the requisite blood quantum requirement to pass freely from Canada to the U.S. This right is recognized by the U.S. through the Jay Treaty, and has been subsequently acknowledged by American courts and codified in its immigration laws.⁶⁷ As a result, Aboriginal people born in Canada who meet the blood quantum requirement prescribed by the state are entitled to enter the U.S. for purposes of employment, study, retirement, investing and/ or immigration,⁶⁸ and are not subject to deportation on any ground.⁶⁹

In granting the right to free passage for Canadian-born Aboriginal people, the U.S. explicitly acknowledges the rights of indigenous peoples to maintain their culture across international borders. However, this recognition is limited by the fact that applicants must provide documentation demonstrating that they possess 50% 'American Indian blood.'⁷⁰ The fact that Canadian law does not define who is Aboriginal by blood status creates further complications in an applicant's ability to establish his or her indigenous identity when crossing the U.S.-Canada border. The fact that both Canada and the U.S. maintain the right to define who is an indigenous person for cross-border purposes, places an inherent limit on the extent to which these countries actively facilitate the rights under Article 36. Unlike the U.S., Canada does not recognize that Aboriginal people have an inherent right to cross the Canada-U.S. border. Instead, Canadian courts have approached the right to free passage by considering the applicant's Aboriginal relationship to Canada in a historic and contemporary context.⁷¹ Canada does not recognize the right to free passage unless an Aboriginal person can establish, among other things, "the existence of an historic practice upon which the right is allegedly based" and "the relationship of

⁶⁷ Sapphire Diamant-Rink, 'The Dividing Line: Borders as an International Indigenous Human Rights Issue' (2009) 30 *Im. & Nat.L.Rev.* 911, 913. See also *McCandless v United States ex rel. Diabo*, 25 F.2d 71 (3rd Circuit Court of Appeal); Immigration and Nationality Act 1965 (US) s (289).

⁶⁸ Embassy of the United States, Entering the U.S.: First Nations and Native Americans <<http://canada.usembassy.gov/visas/information-for-canadians/first-nations-and-native-americans.html>> accessed April 14, 2013.

⁶⁹ *Diamant-Rink* (n 70) 914, citing the U.S. decision *Matter of Yellowquill*, 1978 BIA Lexis 33.

⁷⁰ *Embassy of the United States* (n 71).

⁷¹ Nicole Terese Capton Marques, 'Divided We Stand: the Haudenosaunee, Their Passport and Legal Implications of Their Recognition in Canada and the United States' (2011-2012) 13 *San Diego L.Rev.* 385, 2011-2012, 394-395.

that practice to the culture of an Aboriginal people of Canada,”⁷² or that he or she is an Indian registered under the Indian Act.⁷³

For indigenous groups whose territories are bisected by the international border, such as the Mohawks of Akwesasne, the problems associated with the U.S. and Canada’s failure to fully recognize cross-border rights are a daily reality. The U.S.-Canada border runs directly through the Akwesasne community. In Akwesasne in Canada, the Canadian government maintains that, because the Mohawks moved into the area after the Jay Treaty was signed, the Treaty does not apply (notwithstanding the fact that the lands are a traditional territory of the Mohawk).⁷⁴ On the U.S. side, Akwesasne members can exercise their rights to free passage if they meet the U.S. blood quantum requirements, but post 9/11 have to contend with significantly increased border security.⁷⁵

Akwesasne has had limited success in having its rights implicitly recognized by the Canadian government. Akwesasne has successfully negotiated a remission order with Canada, which provides that Canada will not collect taxes on goods acquired in the U.S. by a resident of Akwesasne for personal or household use.⁷⁶ Akwesasne has also negotiated a political protocol with the Canadian government addressing issues over which Akwesasne can exercise its inherent jurisdiction, including initiatives that support the social and economic development of Akwesasne, divestiture of federal lands, border crossing, and tax exemption.⁷⁷ The international community has further implicitly acknowledged that the Haudenosaunee (of which the Mohawks of Akwesasne are a part) maintain one national identity, notwithstanding divisions imposed by the international border, through the recognition of the Haudenosaunee passport by a number of governments.⁷⁸

(b) United States – Mexico border

Indigenous peoples on the U.S.-Mexico border do not have the benefit of explicit recognition of the right to free passage in international treaties.⁷⁹ In recent decades, the rights of indigenous peoples whose territories lie on the U.S.-Mexico border have been further marginalized by the increased militarization of the U.S. border. As Angelique EagleWoman notes, U.S. policies implemented under the premise of ensuring national security run directly counter to Article 36 of

⁷² *Watt v. Liebelt*, (1999) 2 FC 455 (Canada Federal Court of Appeal).

⁷³ *Capton Marques* (n 74) 395.

⁷⁴ *Diamant-Rink* (n 70) 919.

⁷⁵ *Diamant-Rink* (n 70) 920.

⁷⁶ *Akwesasne Residents Remission Order* R.5.c.41 (3rd Supp.) 3/7/91 *Canada Gazette* Part II. Vol. 125 No.4.

⁷⁷ —“Political Protocol Between Her Majesty the Queen and the Mohawks of Akwesasne” (May 30, 2012) <<http://www.akwesasne.ca/PDF/PoliticalProtocol.pdf>> accessed April 14 2013.

⁷⁸ ⁷⁸ *Capton Marques* (n 74) 388-389. 16 countries have recognized the Haudenosaunee passport since 1923, although the recognition is often considered to be symbolic or a matter of diplomatic courtesy.

⁷⁹ *Diamant-Rink* (n 70) 916. Diamant-Rink notes, however, that some argue that the Treaty of Guadalupe Hidalgo, which originated from the resolution of the Mexican War in 1848 “recognized the right of indigenous peoples living along the border to maintain their land, culture, and religion regardless of the land transfer and new political border.”

the Declaration, and could have the effect of criminalizing the cultural, social and economic ties of indigenous groups whose territories cross the border.⁸⁰

The most visible example of the increased militarization is the ongoing construction of a 700-mile double-layered fence which will separate the U.S. from Mexico, and in so doing, disrupt the lives and culture of indigenous groups whose territories cross the international border.⁸¹

According to EagleWoman, “[s]acred sites are being desecrated by the Border Patrol, and access to such sites will be cut off if the double-layered fence is put into place.”⁸²

For the Tohono O’odham, whose reservation is contiguous with the U.S.-Mexico border, the U.S.’s increasingly militarized approach is a significant impediment to maintaining social, cultural, spiritual and economic ties with members on the opposite side of the border. Members who were once able to travel freely across the border are now forced to drive to checkpoints which may be hours from their homes; furthermore, there have been reports of harassment and of members being turned away at the border by border officials.⁸³ The increased militarization also presents difficult economic and cultural choices for the Tohono O’odham, such as whether to bear the cost of developing government ID cards to cross the border on their own lands, and whether to take on the expense of policing the border themselves or to allow U.S. or Mexico government law enforcement onto their lands.⁸⁴

On the other hand, the Kickapoo in Texas have successfully advocated for the passage of legislation which allows tribe members to pass over the U.S.-Mexico border for specific purposes, including to attend religious sites and to work as migrants in the U.S.⁸⁵ According to Sapphire Diamant-Rink, the legislation “recognizes the unique cultural needs of the Kickapoo, granting them passage and the services provided to other indigenous groups living solely in the United States.”⁸⁶

(c) The Inuit Circumpolar Council

The right to maintain and develop cultural, spiritual, social, and economic relations across borders is reflected in organizations of cross-border indigenous groups, such as the Inuit Circumpolar Council (ICC), an NGO created in 1977 to represent 55,000 Inuit of Alaska, Canada, Greenland, and Chukotka (Russia).⁸⁷ The ICC aims to “strengthen unity among Inuit of

⁸⁰ Angelique Townshend EagleWoman, ‘Fencing Off the Eagle and the Condor, Border Politics, and Indigenous Peoples’ (September 11, 2008) ABA Section of Environment, Energy and Resources: National Resources & Environment, Vol.23, Fall 2008, 33-36 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1266866> accessed April 15 2013.

⁸¹ EagleWoman (n 83) 34.

⁸² EagleWoman (n 83) 35.

⁸³ Diamant-Rink (n 70) 917.

⁸⁴ Diamant-Rink (n 70) 917.

⁸⁵ Diamant-Rink (n 70) 917; *Texas Band of Kickapoo Act*, 25 U.S.C. §§ 1300b-13 (d) (1983)).

⁸⁶ Diamant-Rink (n 70) 917.

⁸⁷ — ‘Inuit Circumpolar Council website’ <<http://www.inuitcircumpolar.com/index.php?Lang=En&ID=1>> accessed April 15 2013.

the circumpolar region; promote Inuit rights and interests on an international level; develop and encourage long-term policies that safeguard the Arctic environment; and seek full and active partnerships in political, economic and social development in the circumpolar region.”⁸⁸

The ICC is governed by a chair and executive council which are elected by delegates throughout the circumpolar region. Elections are held every year at the ICC’s General Assembly, which is attended by representatives of the region, including the Inuit Circumpolar Youth Council and the International Elders Council.⁸⁹ General assemblies are both an opportunity to celebrate cultural heritage and strengthen cross-border bonds between Inuit, as well as an occasion to address developments affecting Inuit across the circumpolar region.⁹⁰

The ICC is active on an international level in relation to a variety of issues including: the promotion of the Inuit language, trade, the environment, resource use, and human rights. To this end, the ICC maintains involvement in a number of international bodies such as the Arctic Council, the United Nations, the World Summit on Sustainable Development, the Convention on the Trade of Endangered Species, the World Intellectual Property Organization, the Organization of American States, and the International Whaling Commission.⁹¹ Between 2002 and 2006, the ICC focused particularly on the Arctic Council, an 8-nation intergovernmental body where governments and indigenous peoples organizations work together on issues related to the environment and sustainable development in the Arctic.⁹²

The ICC also holds consultative status II at the United Nations and is active within the UN and its subsidiary bodies, including the UN Human Rights Commission and its Working Group on Indigenous Populations. The ICC participated in the drafting of the Declaration, and cites the elimination of any specific reference to “the principle of territorial integrity of states” as one of its key successes.⁹³

The ICC’s work on an international level to bring together and promote Inuit interests can be seen as an example of how cross-border rights under Article 36 can be conceptualized as including not only the facilitation of meetings of cross-border indigenous groups for cultural exchanges but also a method for political coordination.

(d) Africa’s Recognition of the Rights of Nomadic Peoples

In Africa, discrimination towards indigenous groups who carry on a nomadic way of life across international borders is still prevalent. For example, the African Commission on Human and Peoples’ Rights describes the marginalization of nomadic groups such as the Pygmies/Batwa,

⁸⁸ *Inuit Circumpolar Council website* (n 90).

⁸⁹ *Inuit Circumpolar Council website* (n 90).

⁹⁰ *Inuit Circumpolar Council website* (n 90).

⁹¹ *Inuit Circumpolar Council website* (n 90).

⁹² *Inuit Circumpolar Council website* (n 90).

⁹³ *Inuit Circumpolar Council website* (n 90).

who practice a forest-based culture and experience varying degrees of exclusion and discrimination in a number of different nations including Rwanda, Burundi, Uganda, the DRC, Cameroon and Congo-Brazzaville.⁹⁴ Rather than facilitating the right of the Pygmies to maintain their nomadic way of life, which spans a number of international borders, steps taken by states to protect the Pygmies are made with the goal “to assimilate the Pygmies into the dominant culture and not to promote multiculturalism.”⁹⁵ In some states, officials consider that the “permanent settlement of the Pygmies is inevitable and irreversible, if they are to become true partners in the national economy.”⁹⁶

African states’ reluctance to facilitate the rights of the Pygmies to develop and maintain their culture across international borders appears primarily rooted in discrimination and misinterpretation of Pygmy culture. In the face of ongoing discrimination at an official level, Pygmies have relatively few tools that could be used to enforce their rights to maintain and develop contacts and cultures across borders under Article 36.

Similarly, other African states use the notion of the sanctity of borders to deny the nomadic inhabitants the right to associate with their kin or to access resources in different countries. For example, nomadic inhabitants of the Kidal region of Mali have experienced harassment as they attempt to cross into Algeria.⁹⁷ Many nomadic peoples have been beaten, searched, or imprisoned when they try to cross borders to obtain basic necessities, without identity cards or travel documents. As with the Pygmies, it is difficult for many nomadic peoples in Africa to realize the practical benefits of their rights under Article 36.

(e) The Draft Nordic Saami Convention

By contrast to the failure of some African states to take steps to promote the cross-border rights of the Pygmies, the draft Nordic Saami Convention, if ratified, could meet or in some aspects exceed the standards for the facilitation of cross-border indigenous rights established under Article 36 for the Saami of northern Europe.

The Saami are an indigenous people who live in what is now Norway, Sweden, Finland, and the Kola Peninsula of the Russian Federation. The Saami are a nomadic people who follow the seasonal migration of reindeer herds across international boundaries.⁹⁸ Norway, Sweden, Finland, and the Saami people are in the process of finalizing the proposed Convention, which, if adopted, would set out the framework by which the states would recognize the rights of the

⁹⁴ ‘ACHPR ‘Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities’ (2005) African Commission on Human and Peoples’ Rights session 28.

⁹⁵ *Report of the African Commission* (n 97).

⁹⁶ *Report of the African Commission* (n 97).

⁹⁷ ACHPR ‘Manual on the Promotion and Protection of the Rights of Indigenous Populations / Communities through the African Human Rights System’ (2012).

⁹⁸ Nigel Banks and Timo Koivurova, *The Proposed Nordic Saami Convention: National and International Dimensions of Indigenous Property Rights* (Hart Publishing, Oxford 2013).

Saami across state borders.⁹⁹ A draft of the Convention was released in 2005, and the aim is to have the Convention finalized by 2015.¹⁰⁰

The Convention has been recognized as an example of how the rights of cross-border indigenous peoples can be facilitated in a manner consistent with the Declaration. According to Timo Koivurova, the underlying premise of Article 36 limits the potential for indigenous peoples to exercise collective self-determination across international borders by encouraging the development of contacts between separated communities, but not the unity of peoples across international borders.¹⁰¹ By contrast, the draft Convention would exceed the scope of rights under Article 36 by creating a “gradual process whereby the Saami and the three Nordic nations may develop their relationship in such a manner that we might perceive four nations, coexisting in the same physical space, composed of the territories of three States,” with a goal of uniting the Nordic Saami communities, rather than merely facilitating cooperation between them.¹⁰²

However, although the draft Convention exceeds Article 36 in some respects, it falls short of fully harmonizing states’ practices and legislation with respect to how the Saami rights-holder is defined in the Convention. As currently worded, the draft Convention both emphasizes the homogeneity of the Saami, but also provides different ways for the participating states to define who is Saami.¹⁰³ The failure to provide a common definition of who is Saami for the purpose of the Convention- or more importantly, to recognize the right of the Saami to determine their own identity -undermines the overarching goal of uniting the Nordic Saami communities.

More generally, the draft Convention highlights the tensions between the rights of cross-border indigenous peoples and state sovereignty. The draft Convention provides, among other things, for the right of the Saami to compensation and profit-sharing in relation to natural resource use, as well as for the right of the Saami to be engaged in the co-determination and environmental management of lands and resources in areas traditionally used by the Saami.¹⁰⁴ The reluctance of some states to finalize the draft in its current form emphasizes the contentious nature of state recognition of cross-border indigenous rights to lands and resources.¹⁰⁵ If adopted, the Convention will stand as an example of how the cross-border rights of an indigenous people can be recognized and facilitated by nation state, and of how this recognition may both co-exist with and pose a challenge to pre-conceived notions of state sovereignty.

⁹⁹ Banks and Koivurova (n 101).

¹⁰⁰ Banks and Koivurova (n 101).

¹⁰¹ Timo Koivurova, ‘Can Saami Exercise Their Self-Determination?’ in Nigel Banks and Timo Koivurova (eds), *The Proposed Nordic Saami Convention: National and International Dimensions of Indigenous Property Rights* (n 101).

¹⁰² Koivurova (n 104).

¹⁰³ T Joona, ‘The Subjects of the Draft Nordic Saami Convention’ in N Banks and T Koivurova (eds), *The Proposed Nordic Saami Convention: National and International Dimensions of Indigenous Property Rights* (n 101).

¹⁰⁴ Banks and Koivurova (n 101).

¹⁰⁵ Banks and Koivurova (n 101).

VI. Conclusion

What has emerged from the study in this chapter is that the “pre-invasion” paradigm developed primarily for the Americas, Australia and New Zealand, is a useful tool in conceptualizing who are indigenous and who not. However, even within that paradigm, there are situations, such as the Métis in Canada or the Maroons in South America, who do not fit neatly into the “pre-invasion” model. When we move to Africa and Asia, this paradigm becomes quite awkward to apply because of a number of factors including a history of internal migrations and the dynamics of post-colonial development. This leaves us, we feel, with three contextual factors to consider in the recognition of indigenous people under the Declaration. To be considered “indigenous” in the context of the Declaration, the group in question would:

1. self- identify as culturally and linguistically distinct from other groups in the population;
2. form a “non-dominant” sector of society; and
3. have a historical connection to a collective territory.¹⁰⁶

The term “indigenous” is not to be understood by its anthropological definition,¹⁰⁷ but rather as, James Anaya suggests, a rubric that “can be seen as one of context rather than abstraction.”¹⁰⁸

Article 9 gives indigenous peoples and individuals the right to belong to an indigenous collectivity, a right that states cannot interfere with. However, it is the customs and traditions of the indigenous people that will determine whether the individual will be accepted into the community.

In our discussion on Article 33, we have described problematic decisions made by American tribes on membership. We argue that the control of membership is subject to the gender equality and international human rights norms set out in Article 44 and 46 of the Declaration. Furthermore, we raise the possibility that indigenous governments, not state governments, are responsible for ensuring conformity with these norms. Article 35 addresses responsibilities that members have to their communities. We argue that the exercise of these responsibilities should be paramount over laws of the state which conflict with the exercise of these responsibilities. The discussion of contacts across borders set out in Article 36 suggests that states’ willingness to implement and facilitate the cross-border rights of indigenous peoples is situation-specific and is often recognized in a limited manner, secondary to national security concerns. Arrangements

¹⁰⁶ The 2005 guidelines from the World Bank do not mention a chronological “pre-invasion” criterion in their description of indigenous peoples. World Bank, ‘Operational Manual, OP 4.10 Indigenous Peoples’, 2005, sections 3-5, <<http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20553653~menuPK:4564187~pagePK:64709096~piPK:64709108~theSitePK:502184~isCURL:Y,00.html>> accessed 13 April 2013.

¹⁰⁷ For a lively exchange among seven anthropologists on the concept of indigeneity, see Mathias Guenther, Justin Kenrick, et al, ‘Discussion: The Concept of Indigeneity’ (2006) 14 Social Anthropology 17.

¹⁰⁸ Anaya (n 5) 30.

which facilitate border-crossings and government funding for indigenous organizations such as the Inuit Circumpolar Council and the proposed Nordic-Saami Convention represent positive steps towards realizing the rights of indigenous peoples across international borders. The construction of the US-Mexico fence and Canada's refusal to acknowledge the Akwesasnes' right to bring goods across the border, however, reflect instances of ongoing reluctance on the part of some states to fully recognize the cross-border rights of indigenous groups.

The views expressed in this chapter are necessarily preliminary. We have attempted to illustrate examples of current state practices that may, or may not, be consistent with the provisions of the Declaration. There are a number of complex issues that should be resolved, not on an abstract basis, but in the process of implementing the provisions in the Declaration. We look forward to observing developments in the years to come.